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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/501,319	10/28/2004	Guenter Schubert	20496-445	6121

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PROSKAUER ROSE LLP  
PATENT DEPARTMENT  
1585 BROADWAY  
NEW YORK, NY 10036-8299

EXAMINER
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KRUER, KEVIN R

ART UNIT	PAPER NUMBER
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1773

DATE MAILED: 09/20/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/501,319	<b>Applicant(s)</b> SCHUBERT ET AL.	
	<b>Examiner</b> Kevin R. Kruer	<b>Art Unit</b> 1773	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 12 August 2005.  
 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.  
 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-4 and 6-8 is/are pending in the application.  
 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.  
 6) ☒ Claim(s) 1-4 and 6-8 is/are rejected.  
 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.  
 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.  
 10) ☒ The drawing(s) filed on 12 July 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) ☒ All b) ☐ Some \* c) ☐ None of:  
 1. ☐ Certified copies of the priority documents have been received.  
 2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
 \* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>8-12-2005</u> . | 6) <input type="checkbox"/> Other: _____  |

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**DETAILED ACTION**

***Information Disclosure Statement***

1. The information disclosure statement filed August 12, 2005 has been fully considered and an initialed copy of said PTO-1449 is enclosed herein.

***Specification***

2. The examiner acknowledges the filing of an abstract on a separate sheet on August 12, 2005. Said abstract is sufficient for overcoming the objection noted in the Non-final office action.

3. The specification has been amended (8-12-2005) to recite that the current application is a national stage application.

***Claim Rejections - 35 USC § 102***

4. The rejection of claims 1, 3, 4, 7, and 8 under 35 U.S.C 102(b) as being anticipated by EP 0329336 (herein referred to as Balloni) has been overcome by amendment. Claim 1 has been amended to include the limitations of claim 5.

5. The rejection of claims 1, 3, 7, and 8 under 35 U.S.C 102(b) as being anticipated by EP 0096581 (herein relied upon as Misasa) has been overcome by amendment.

Claim 1 has been amended to include the limitations of claim 5.

The rejection of claims 1, 2, 4, and 6-8 under 35 U.S.C 102(b) as being anticipated by Eggen (US 3,291,377) has been overcome by amendment. Claim 1 has been amended to include the limitations of claim 5.

6. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

7. Claims 1, 2, and 6 are rejected under 35 U.S.C 102(b) as being anticipated by JP 11-130141A (herein referred to as Toyo) for reasons of record.

Toyo teaches a foil having an outer aluminum foil layer of thickness 10-30um and an inner aluminum foil layer of thickness 12-60um. An intermediate resin layer (herein relied upon to read on the claimed "tear resistant polymer") is present between the two foils and a heat-sealing layer is laminated to the inner aluminum foil layer (abstract).

***Claim Rejections - 35 USC § 103***

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

9. Claims 1-4 and 6-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Festag et al (US 4,172,914) in view of Okuhara et al (US 3,888,224).

Festag teaches an Al/plastic laminate foil comprising an aluminum foil with plastic foil stuck on at least one side whereby the plastic foil exhibits an elongation at fraction of 80-100% (abstract). The laminate foil is suitable for the manufacture of containers by deep drawing whereby no cracks or macropores form in the Al foil (abstract). Foodstuff, pharmaceuticals, and chemicals may be packaged in said container (col 1, lines 5+). The plastic foil is joined to the Al foil by means of an adhesive (col 2, lines 5+). Said plastic foil may comprise polyester (col 3, lines 14+) and is herein relied upon to read on the claimed "tear-resistant polymer." The aluminum foil may be 20um thick (col 3, lines

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1+) and is herein relied upon to read on the claimed "second layer of aluminum material").

With regard to claim 7, Festag teaches the tear-resistant polymer is adhered to the aluminum material with an adhesive. Said adhesive is understood to read on the claimed "adhesion promoter layer." Festag does not teach said adhesive should be co-extruded with the tear-resistant polymer. However, the courts have held that the method of making a product does not patentably distinguish a claimed invention from an invention taught in the prior art unless it can be shown the method of making the product results in a materially different product. In the current application, no such showing has been made. The foil laminate of Festag is, therefore, understood to read on the claimed foil because it comprises the same layers comprising the same compositions and ordered in the same relative order as the claimed foil.

Festag does not teach the interior of the container should comprise a second layer of aluminum material. However, Okuhara teaches a container may inhibit, prevent, and/or decolorize melaooids in liquid foods by providing a metal selected from the group consisting of Al, Mg, Mn, and Zn on the interior of the container (col 2, lines 47+). Aluminum is preferred (col 3, lines 32+) and may be applied as a foil or with the vaporization process (col 3, lines 62+). Thus, it would have been obvious to one of ordinary skill in the art at the time the invention was made to apply an aluminum foil or aluminum deposited by evaporation onto the interior plastic of the container taught in Festag. The motivation for doing so would have been to inhibit, prevent, and/or decolorize melaooids in liquid foods packaged therein.

***Response to Arguments***

Applicant's arguments filed August 12, 2005 have been fully considered but they are not persuasive.

Applicant argues JP'141 fails to disclose or suggest a foil comprising an extrusion-lamination layer of tear-resistant polymer. Said argument is noted but is not persuasive. The courts have held that the method of making a product does not patentably distinguish a claimed invention from an invention taught in the prior art unless it can be shown the method of making the product results in a materially different product. In the current application, no such showing has been made. The foil laminate of JP'141 is, therefore, understood to read on the claimed foil because it comprises the same layers comprising the same compositions and ordered in the same relative order as the claimed foil.

Applicant argues providing an extrusion lamination layer has the advantage that it ensures a secure bond between the extrusion lamination layer of the tear resistant polymer and the aluminum layer. Said argument is noted, but does not distinguish the claimed invention from the prior art. Specifically, there is nothing on record that demonstrates the laminates of the prior art fail to have a "secure bond between" the tear resistant layer and the aluminum layer. Applicant further argues the present invention receives its special characteristics because the polymer layer is directly laminated onto the aluminum foil. Said argument is noted but is not persuasive because counsel's argument cannot take the place of evidence.

Therefore, the rejection is maintained.

***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kevin R. Kruer whose telephone number is 571-272-1510. The examiner can normally be reached on Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Carol Chaney can be reached on 571-272-1284. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Kevin R. Kruer  
Patent Examiner-Art Unit 1773